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IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

EL PASO NATURAL GAS COMPANY, ET AL.,

Petitioners,

v.

LAURA NEZTSOSIE, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF BERTRAM ROBERTS, HANNI ROBERTS, AND PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI[1]

Bertram Roberts and Hanni Roberts are the plaintiffs in a suit now pending before this Court on a petition for a writ of certiorari. *See Roberts v. Florida Power & Light Co.*, No. 98-640 (filed Oct. 16, 1998). Mr. Roberts alleges that he developed leukemia as a result of radiation exposure at a nuclear power plant where he worked as an electrician for 23 years. The Robertses maintain that the power plant operator is liable for their damages under Florida common law. The Eleventh Circuit held, however, that their common-law claims are preempted by federal regulations promulgated by the Nuclear Regulatory Commission ("NRC") that establish the maximum permissible radiation dose at nuclear plants. The Eleventh Circuit concluded that those dose regulations provide the sole duty of care in any case involving damages from radiation exposure, and that, because the Robertses had not claimed a violation of those regulations, their claims were preempted. *Roberts v. Florida Power & Light*, 146 F.3d 1305 (11th Cir. 1998).

In this case, the El Paso petitioners' principal argument for reversal is that there is no basis for tribal jurisdiction in a case concerning nuclear radiation because federal law, in particular the Atomic Energy Act and its Price-Anderson Act ("PAA") amendments, 42 U.S.C. 2210 *et seq.*, completely preempts the field of nuclear power. In so arguing, petitioners rely on the Eleventh Circuit's ruling in *Roberts* and other decisions holding that federal regulations provide the exclusive

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of this Court, *amici* state that no party had any role in writing this brief and that no one other than *amici* or their counsel made a monetary contribution to its preparation or submission.

duty of care in cases involving nuclear radiation torts. *See* Brief for Petitioners ("Pet. Br.") 21. As we argue below, petitioners are wrong on the tribal jurisdictional question, because the PAA does not expressly or impliedly bar tribal courts from hearing nuclear radiation torts. Moreover, even if this Court were to resolve the question presented *against* tribal jurisdiction, the Robertses have a very strong interest in how this Court comes to that conclusion. In particular, if the Court were to decide this case on the basis urged by petitioners—the purported preemptive effect of federal law—such a ruling might place this Court's imprimatur on the Eleventh Circuit's ruling in *Roberts*.

As the Robertses show below, the PAA does not preempt state-law standards of care, but in fact specifically adopts them. *See* 42 U.S.C. 2014(hh). This fact not only demonstrates the flaw in the Eleventh Circuit's decision in *Roberts* (and the need for this Court to review that decision), but is also the key to understanding why the Ninth Circuit was correct in upholding the exercise of tribal jurisdictional here.

Public Citizen is a non-profit consumer advocacy group with approximately 150,000 members nationwide. It has a longstanding interest in tort cases that raise federal preemption issues, because it believes that expansive interpretations of the preemptive scope of federal statutes, such as that advanced by petitioners here, can serve to undermine congressional intent and the ability of injured parties to obtain compensation. Public Citizen has particular expertise on the preemption issue before the Court, because its attorneys represent the Robertses. Moreover, Public Citizen has a broad outlook on preemption issues that may be useful to the Court, because its attorneys have represented plaintiffs in a wide range of tort preemption cases. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996).

STATEMENT OF THE CASE

The parties have adequately set out the facts of the underlying suits and the decisions below involving the tribal exhaustion doctrine. However, in order to explain the errors in petitioners' analysis, Part A provides a history of the PAA. Then, in Part B, we briefly recount the facts and decision in *Roberts* in order to show the potential overlap between that case and the cases now before this Court.

A. The Price-Anderson Act.

1. Enactment and 1966 Amendments.

The PAA was enacted in 1957 as an amendment to the Atomic Energy Act of 1954 to encourage private development of nuclear power plants. To overcome private sector reluctance to provide atomic power because of the potential for catastrophic accidents and the unavailability of private liability insurance, the PAA provided a system of compensation for injuries resulting from nuclear accidents. S. Rep. No. 218, 100th Cong., 1st Sess. 2 (1987), *reprinted in* 1988 U.S.C.C.A.N. 1477; H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 1 at 4 (1987). Thus, the PAA established a system of comprehensive liability insurance for providers of nuclear energy under contract or license with the government. S. Rep. No. 70, 100th Cong., 1st Sess. 13-14 (1987), *reprinted in* 1988 U.S.C.C.A.N. 1426-27; *see generally Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 64-67 (1978).

The 1957 law had three features. First, it limited the

aggregate liability of private nuclear operators under contract or license with the federal government. Second, it channeled so-called "public liability" actions—those arising from nuclear accidents—by providing that any person who might be held liable for an accident would be indemnified by the federal government. Third, it required that, in cases where claims for public liability exceeded the required level of private insurance, the federal government would reimburse the person held liable up to the Act's aggregate liability limit. S. Rep. No. 218, *supra* at 2, *reprinted in* 1988 U.S.C.C.A.N. 1477.

In 1966, Congress amended the PAA out of concern that the public be quickly and adequately compensated for injuries resulting from a nuclear accident by, among other things, providing for development of a compensation and distribution plan in the event that claims exceeded the Act's aggregate liability limits. S. Rep. No. 1605, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 3201-03. The amendments also sought to simplify the system for compensation of public liability claims and to ensure similar treatment of claims arising out of certain nuclear accidents. Thus, under the "waiver-of-defenses" provision, 42 U.S.C. 2210(n)(1), defendants in cases involving a large nuclear accident, known as an "extraordinary nuclear occurrence" ("ENO"), could be required to waive any defenses related to (1) the plaintiff's conduct or the defendant's lack of fault, (2) government or charitable immunity, and (3) the statute of limitations, if the suit were filed within three years of the date the plaintiff became aware of his injuries or damages, but no more than ten years after the date of the nuclear incident. *See* S. Rep. No. 1605, *supra*, *reprinted in* 1966 U.S.C.C.A.N. 3201-02; *see also* S. Rep. No. 218, *supra* at 2, *reprinted in* 1988 U.S.C.C.A.N. 1477-78. In essence, the waiver-of-defenses provision required an ENO victim "to prove only that he or his property was damaged and that such damage

was caused by the nuclear incident." S. Rep. No. 1605, *supra*, *reprinted in* 1966 U.S.C.C.A.N. 3209. As a result, for ENO claims, all courts would apply principles similar to strict liability. *Id.* at 3207.

The 1966 amendments also created federal jurisdiction for claims involving an ENO in the district where the accident occurred. This jurisdictional provision allowed the defendants to remove actions pending in state courts and to transfer actions pending in other federal courts to the federal district court having venue. This provision thus allowed claims arising out of a single serious nuclear accident (ENO) to be consolidated in one court. *Id.* at 3215.

2. The 1988 Amendments.

In 1988, Congress passed another set of PAA amendments, which are important to understanding the issues before this Court. In the amici's view, the 1988 law underscores the error committed by the Eleventh Circuit in their case, because that law explicitly adopts state substantive law in cases involving personal injuries caused by nuclear radiation. On the other hand, the El Paso petitioners and the United States contend here that the 1988 amendments support their argument that federal law completely preempts the field of nuclear energy, and thus requires reversal of the decision below. Pet. Br. 9-26; Brief for the United States as Amicus Curiae ("U.S. Br.") 13-20. Indeed, petitioners and the Solicitor General concede that had respondents' claims arisen prior to 1988, there would be no preemption because persons claiming injury from radiation could recover under any state-law theory of liability. *See* Pet. Br. 13-15; U.S. Br. 17; *see also Roberts*, 146 F.3d at 1308 n.5 (suggesting dispositive effect of 1988 amendments).

But this substantial loss of rights for those harmed by radiation is impossible to square with the 1988 amendments, whose main thrust, like the 1966 legislation, was to improve the compensation system for victims of nuclear exposure, not to restrict or eliminate liability for the nuclear industry. Thus, the 1988 law extended the indemnification system for thirty years; increased the aggregate indemnification level; created an expedited mechanism to allow congressional action for additional compensation; and broadened the scope of the public compensation system to include nuclear waste disposal activities and incidents involving stolen nuclear materials. S. Rep. No. 70, *supra* at 12, *reprinted in* 1988 U.S.C.A.A.N. 1425. The amendments also clarified that lessors of nuclear facilities could not be held liable for nuclear accidents occurring in the facility, and they barred awards of punitive damages where the federal government would be liable for them under an indemnification agreement. H.R. Rep. No. 104, *supra*, pt. 1 at 19. This latter provision was a response to the Court's decision in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), which held that the Atomic Energy Act, as informed by the PAA, does not preempt an award of punitive damages under state tort law arising out of radiation exposure from a nuclear power plant.

The 1988 amendments also included two responses to litigation over the Three Mile Island incident. S. Rep. No. 218, *supra* at 13, *reprinted in* 1988 U.S.C.C.A.N. 1488. All of the Three Mile Island suits were originally consolidated in the District Court for the Middle District of Pennsylvania, where the accident occurred. After the Nuclear Regulatory Commission ("NRC") determined that the accident was not an ENO, however, the claims were dismissed for lack of subject matter jurisdiction since, absent diversity, federal jurisdiction extended only to ENOs. *Id.* To ensure that federal courts could

hear all types of nuclear incident claims, not just those involving ENOs, the 1988 amendments broadened the grant of original federal jurisdiction to cover all nuclear incidents. H.R. Rep. No. 104, *supra*, pt. 1 at 18, 50; *see* 42 U.S.C. 2210(n)(2). The law did not, however, bar suit in tribal courts, nor did it provide for removal from tribal courts to federal court.

The 1988 amendments also defined the term "public liability action," which was not defined in the 1966 amendment granting federal jurisdiction over ENO claims. That definition included an anti-preemption clause, which specifically adopts state substantive law, presumably to ensure that the grant of federal jurisdiction would not suggest that the courts develop a body of federal substantive law. Thus, in a public liability action "the substantive rules for decision ... shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of" 42 U.S.C. 2210. *See* 42 U.S.C. 2014(hh).

The "provisions" of section 2210, in turn, concern a variety of issues such as indemnification, collection of fees from NRC licensees, and regulatory reports to Congress. *See* 42 U.S.C. 2210. With the exception of section 2210(s)—the provision barring punitive damages in certain circumstances—the 1988 amendments did not limit the level of compensation to be awarded in a public liability action, much less address the substantive standard of care in such an action.

B. Facts and Proceedings in *Roberts v. Florida Power & Light.*

As noted earlier, the Robertses' suit seeks damages for injuries suffered by Bertram Roberts while working at the Turkey Point Nuclear Power Plant operated by Florida Power

& Light Company ("FPL") from 1966-1989. In January 1993, Mr. Roberts was diagnosed with myelogenous leukemia, a type of cancer linked to radiation exposure. Eleventh Circuit Record Excepts in *Roberts v. Florida Power & Light*, at 9-10.

The Robertses filed suit under Florida common law, contending that FPL breached a duty of reasonable care by exposing Mr. Roberts to more radiation than was necessary, by not helping him take precautionary steps, such as providing appropriate protective clothing, and by not warning him of the danger of working at the plant. *Id.* at 11-12. The complaint also contained a strict liability claim. *Id.* at 13-14. Mr. Roberts's wife, Hanni Roberts, claimed loss of consortium. *Id.* at 15.

FPL moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), arguing that the PAA preempts any duty of care defined by state tort law for operators of nuclear power plants. The district court agreed, and dismissed the case. The Eleventh Circuit affirmed per curiam. *Roberts*, 146 F.3d 1305. The court stated that the federal government's exclusive role in regulating the safety of nuclear technology extended to actions for damages, as well as to state regulatory efforts, citing this Court's decisions in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983), and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). The court relied on *Silkwood* despite its holding that an award of punitive damages in a wrongful death action arising from nuclear plant radiation was *not* preempted by the Atomic Energy Act. Ignoring section 2014(hh)'s express adoption of state substantive law, the court of appeals stated that "federal regulations must provide the sole measure of the defendants' duty in a public liability action" because of the federal government's pervasive role in nuclear

regulation. *Roberts*, 146 F.3d at 1308. It therefore concluded that, because the Robertses could not show that FPL exposed Mr. Roberts to radiation in violation of the maximum federal dose, their claims under Florida law were preempted.

SUMMARY OF ARGUMENT

This Court's decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), does not require reversal. *Strate* held that a tribal court did not have jurisdiction over a car accident case that occurred on *non-Indian* land—a state highway running through a reservation. *Strate* is irrelevant to the situation here, where Indian plaintiffs allege that non-Indians committed wrongs on tribal land, a suit at the core of traditional tribal court jurisdiction. *See, e.g., Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty"). In sum, there is no basis in the Indian law teachings of this Court to abrogate the ordinary rule of tribal exhaustion.

Aside from *Strate*, petitioners argue that the Price-Anderson Act completely preempts tribal courts from entertaining suits alleging injury from nuclear materials, *see* 42 U.S.C. 2014(q),(w), and thus overrides the ordinary rule requiring tribal court exhaustion. That assertion is wrong for two related reasons. First, the PAA does not expressly bar *any* court—state, federal, or tribal—from hearing nuclear tort actions; rather, the Act permits such actions to be filed in any general jurisdiction court, with a right of removal from state (but not tribal) court to federal court. *See* 42 U.S.C. 2210(n)(2). Second, with only a few exceptions, the applicable substantive law in a public liability action is *not* federal law, but state law, 42 U.S.C. 2014(hh), which demonstrates that the PAA does not have the pervasive preemptive effect that petitioners claim. The

Ninth Circuit was therefore correct in holding that tribal courts have the authority to determine, in the first instance, their own jurisdiction over nuclear tort cases without prior federal-court intervention.

ARGUMENT

From *amici*'s perspective, the issues in this case break down into two questions. First, does this Court's recent decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), concerning the civil jurisdiction of tribal courts, require reversal, as petitioners contend? That question is important because it is the only non-preemption-based reason given by petitioners for reversal of the Ninth Circuit's ruling. *See* Pet. Br. 29-33. If the answer to that question is "no," as we show in Part A below, the second question is whether the preemptive effect of the Price-Anderson Act is so pervasive as to bar the tribal courts in these cases from determining, in the first instance, their own jurisdiction. As we show in Part B, the answer to that question is also "no," because the PAA specifically provides that federal law is *not* the applicable substantive law in nuclear tort cases, thus undermining any claim that federal law occupies the field to the exclusion of state or tribal law.

A. This Court's Decision In *Strate* Does Not Require Reversal.

Petitioners argue that this Court's decision in *Strate v. A-1 Contractors*, 520 U.S. 438, requires reversal. In *Strate*, the Court held that a tribal court lacked jurisdiction to entertain a car accident case on a highway running through an Indian Reservation. The defendants were not tribe members, nor was the injured plaintiff (although the plaintiff's relatives who

claimed loss of consortium were members). The highway was maintained by the state of North Dakota, pursuant to a right-of-way granted to the state's highway department by the United States. The right-of-way lay on land held in trust for certain Indian tribes by the United States. *Id.* at 442-43.

Strate relied on the Court's earlier ruling in *Montana v. United States*, 450 U.S. 544 (1980), which established "a general rule that, absent a different Congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation." *Strate*, 520 U.S. at 446. The rule in *Strate* has nothing to do with a situation, like the one presented here, involving disputes that occur on Indian land and in which Indians are injured. As noted above, *Strate* concerned the conduct of non-members "on *non-Indian land* within a reservation." *Id.* at 446 (emphasis added); *see also id.* at 454 (the decision in *Montana* applies to "activity on alienated, non-Indian reservation land"). Indeed, the Court noted "that tribes retain considerable control over nonmember conduct on tribal land." *Id.* Or, as the Solicitor General puts it, *Strate* "is irrelevant where, as here, the conduct arises on tribal lands and therefore falls squarely within the heartland of tribal sovereignty...." U.S. Br. at 12; *see also Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty").

Petitioners, but not the United States, nonetheless assert, in reliance on *Strate*, that, in *all* matters concerning authority over the conduct of non-Indians, a tribe's *adjudicative* jurisdiction does not extend beyond its *legislative* jurisdiction. Pet. Br. 30. In other words, petitioners maintain that, because Indian tribes cannot regulate the safety aspects of nuclear power, absent express congressional delegation, their courts

have no authority to adjudicate claims asserting injury from nuclear activities. Although one sentence of the *Strate* decision does equate tribal legislative and adjudicative jurisdiction, *id.* at 453, it is clear from the immediately preceding sentence of the Court's opinion that such a restriction on tribal jurisdiction applies only to "activity on *non-Indian* fee land within a reservation." *Id.* (emphasis added).

This view of *Strate* is consistent with the arguments that were advanced and rejected by the Court in that case. *Strate* considered the argument that *Montana* did not apply because the land where the accident occurred was held in trust for certain Indian tribes by the United States, *i.e.*, that the land where the accident occurred was equivalent to tribal land. The Court rejected that argument, not because ownership of the land did not matter, but because "[t]he right-of-way North Dakota acquired for the State's highway renders the 6.59-mile stretch [where the accident occurred] equivalent, for nonmember governance purposes, to alienated, non-Indian land." *Id.* at 454 (footnote omitted). Indeed, the Court analyzed the tribes' interest in the land in considerable detail, *id.* at 454-56, concluding that the tribes "reserved no right to exercise dominion or control over the right-of-way." *Id.* at 455. Thus, ownership of land was key to the Court's decision, and it was only because North Dakota's right-of-way extinguished tribal authority over the relevant piece of land that *Montana* controlled the outcome.

In sum, we cannot improve on the Solicitor General's conclusion regarding *Strate*: "[I]f a tribal court otherwise has jurisdiction to hear a case (*e.g.*, because the conduct occurred on tribal land), any qualification of the tribal court's authority ... cannot derive from the jurisdictional concerns underlying *Strate*. Any such qualification must derive instead from the

particular nature of the federal statutory scheme at issue." U.S. Br. 13. Therefore, we now turn to the relevant statutory scheme.

B. The Price-Anderson Act Does Not Completely Preempt Respondents' Claims.

The principal basis for reversal urged by petitioners and their amici, including the United States, is that respondents' claims arise under the PAA which, they assert, completely preempts all law other than federal law. As the Solicitor General correctly notes, an "ordinary" federal preemption defense is not the basis for removing a case from state to federal court or, in this case, for abrogating the tribal exhaustion doctrine, because such a defense does not arise on the face of a well-pleaded complaint. Rather, such ordinary preemption questions are decided by the court in which the case has been filed. *See* U.S. Br. 14.

But petitioners and the United States maintain that the preemption defense here is not an ordinary preemption defense, but rather one of "complete preemption." *See* U.S. Br. 14. Where that doctrine applies, as it sometimes does, for instance, in the labor law context, *see Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968), the federal interest in the subject matter is so pervasive that the defendant may remove a case filed in state court on the strength of that interest, and the federal court will decide the preemption issue, even though no federal issue appears on the face of the complaint. Thus, the argument advanced here against tribal exhaustion takes the form of the following syllogism: The PAA is a complete preemption statute, and since complete preemption statutes allow the defendant immediate access to federal court, to require exhaustion in tribal court is inconsistent with the PAA.

Regardless of whether the conclusion of the syllogism (equating complete preemption with an absence of tribal jurisdiction) is correct, its premise is fatally flawed because the PAA is *not* a complete preemption statute.

In addressing the complete preemption doctrine, the fundamental inquiry must center around how the PAA actually operates with respect to the claims asserted by plaintiffs in nuclear tort cases. That inquiry, in turn, requires the Court to look at two separate, but related, questions: (1) What is the PAA's effect on *jurisdiction, i.e.*, which courts may entertain cases involving nuclear incidents; and, (2) What is the PAA's *substantive* effect, *i.e.*, which law applies in public liability actions? In neither area is the role of federal law so pervasive as to completely preempt the field.

1. *The PAA Does Not Completely Preempt The Jurisdiction Of Non-Federal Courts, Including Tribal Courts.*

As to jurisdiction, the PAA does not bar a plaintiff from filing a nuclear tort suit in *any* court. Rather, the PAA provides original federal jurisdiction in the district in which the alleged nuclear incident occurred, and allows (but does not require) a defendant to transfer a case from another federal district court, or to remove a case from any state court, to the district court where the ENO occurred. 42 U.S.C. 2210(n)(2). This removal authority is consistent with the fact that, since 1988, a suit alleging injury from a nuclear incident is a federal cause of action: a "public liability action" that is said to "aris[e] under" section 2210 of the PAA. *See* 42 U.S.C. 2014(hh). Of particular significance here, the PAA does not mention tribal jurisdiction; it does not bar suit in tribal court, *and* it does not authorize removal from tribal court to federal court. Whether

a public liability action may be maintained in tribal court is a close question, to which we will return later (*see infra* at 21-25), but for present purposes, it is clear that no bar to tribal jurisdiction appears in the text of the PAA. That being the case, based on the PAA's jurisdictional provision alone, there is no complete preemption of tribal jurisdiction that would justify abrogation of the tribal exhaustion doctrine. In other words, regardless of how the jurisdiction question is ultimately resolved, there is no basis to prevent a tribal court from considering that issue in the first instance.

2. *The PAA Is Not A Complete Preemption Statute Because The Applicable Law In A Public Liability Action Is Not Federal Law.*

In any event, petitioners' focus on the PAA's general preference for federal-court jurisdiction misconstrues the complete preemption doctrine. In our view, the principal question is not whether Congress provided a federal forum for resolving the dispute, but whether the federal *substantive* interest in the subject matter is so great that *only* a federal court should have authority to decide the preemption question. Thus, for instance, in the labor law context, complete preemption has been found because the federal government has occupied the field, and by doing so relegated to itself *substantive* power over labor policy, including the remedies available to workers and companies for violations of federal labor law. *See, e.g., Avco*, 390 U.S. at 129-30.

But the PAA specifically rejects that kind of complete preemption. Indeed, as we now explain, with a few exceptions, Congress has made clear that state, not federal, law applies in determining whether and to what extent persons claiming injury from nuclear incidents should be compensated.

Petitioners' complete preemption argument is premised on their assertion that respondents' suits are "public liability" actions created by the PAA. We acknowledge that the PAA's definition of "public liability," 42 U.S.C. 2014(w), which includes any "nuclear incident," 42 U.S.C. 2014(q), is quite broad, and we take no position on whether that definition extends to the mining (rather than nuclear power plant) activities at issue in the suits before this Court. Rather, we assume *arguendo* that respondents have filed public liability actions, and acknowledge that such actions arise under federal law (section 2210 of the PAA); however, the recognition that federal law establishes the cause of action represents the beginning, not the end, of the preemption analysis, because it does not tell us what body of substantive law is applicable to that cause of action.

Because the "touchstone" of any preemption analysis is congressional intent, as reflected in the language that Congress enacts, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), we turn first to the PAA's definition of "public liability action":

> The term "public liability action," as used in section 2210 of this title, means any suit asserting public liability. A public liability action shall be deemed to be an action arising under section 2210 of this title, and *the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.*

42 U.S.C. 2014(hh) (emphasis added). The most striking feature of section 2014(hh) is that, in the main, it is an *anti-*

preemption provision, under which state law provides "the substantive rules for decision" except where it is "inconsistent" with 42 U.S.C. 2210. *Cf. California Fed'l Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 281-82 (1987) (analyzing similar anti-preemption provision). Therefore, to understand the preemptive scope of the PAA, it is necessary to examine section 2210 to determine the precise subjects that it affects.

Generally speaking, section 2210 establishes the PAA's insurance and indemnification scheme, which ensures that funds will be available to compensate victims of a nuclear incident. There are a few provisions of section 2210 in which Congress altered state tort law, such as the limitation on aggregate public liability, 42 U.S.C. 2210(e), and the bar on punitive damages where the United States is obligated to make payments under an indemnity agreement, 42 U.S.C. 2210(s). Other than these provisions, however, federal law does not alter state-law rules of decision.

In making their preemption argument, petitioners and their *amici* point in particular to the Eleventh Circuit's decision in *Roberts* and other circuit court decisions that hold that federal regulations, including the federal radiation dose limits, preempt state-law duties of care. *See* Brief of American Nuclear Insurers ("ANI Br.") 23; *see also* Pet. Br. 21; U.S. Br. 18 n.10. But as the Robertses have explained in detail in their pending petition for a writ of certiorari, *see* Pet. for Writ. of Cert. in No. 98-640, at 13-24, those decisions are fundamentally flawed because the duty of care is a "substantive rule[] for decision"—indeed, *the* core rule for decision—in a tort action. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 71 (1938) (applicable rule of decision was state-law duty of care). And because section 2210 does not abrogate state-law duties of care, they apply in all public liability actions, under the plain terms

of 42 U.S.C. 2014(hh).

In fact, the radiation dose limits on which the Eleventh Circuit in *Roberts* relied for preemption, *see* 10 C.F.R. 20.1201-.1208, are not based on the PAA generally, let alone on section 2210 in particular. Rather, as the NRC has noted, those dose limits are authorized by provisions of the Atomic Energy Acts of 1946 and 1954. *See* 10 C.F.R. Part 20, at p. 281 (1998) (citing 42 U.S.C. 2073, 2093, 2095, 2111, 2133, 2134, 2201, 2232, 2236 as "Authority"). In sum, section 2014(hh)—the sole provision that concerns applicable law in a public liability action—explicitly preserves, rather than preempts, damages claims based on a state-law duty of care. That conclusion demonstrates not only that the Eleventh Circuit's decision in *Roberts* is flatly wrong, but that there is no basis for finding that the complete preemption doctrine overrides the tribal exhaustion doctrine in the cases now before this Court.

Because the text of the PAA is clear, leaving no doubt that state, not federal, standards of care apply in a public liability action, there is no need to consult the Act's legislative history. *See, e.g., Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993). In any event, the PAA's legislative history repeatedly confirms its plain meaning and Congress's desire to adopt state standards of care in public liability actions. The overriding purpose of both the 1966 and the 1988 PAA amendments was to authorize federal court *jurisdiction* over claims arising from nuclear incidents, not to impose federal substantive law. Indeed, in passing the 1966 amendments, Congress explicitly decided not to enact substantive law (*i.e.*, a new body of federal tort law). S. Rep. No. 1605, *supra*, *reprinted in* 1966 U.S.C.C.A.N. 3209. Rather, the approach taken by Congress was

> in keeping with the approach followed in enacting the original Price-Anderson Act—namely, *interfering with State law to the minimum extent necessary*. In essence, the plan adopted permits the *retention of State law* with respect to the cause of action and the measure of damages, but the requirements specified for the insurance contracts and the indemnity agreements provide the uniform rules needed to accomplish the bill's objectives. . . . *[T]his is not a measure designed either to accomplish a general revision of American tort law* or to set precedents for activities in other fields.

Id. (emphasis added).

The legislative history of the PAA's 1988 amendments emphasizes the same theme. Prior to 1988, no court had ever held that a state-law personal-injury claim against a nuclear plant operator was preempted by the PAA. Cases such as the Robertses' were governed by state law and, because federal question jurisdiction did not exist, were litigated in state court absent diversity. *See Stibitz v. GPU*, 746 F.2d 993, 995-97 (3d Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985)). Although one of the purposes of the 1988 amendments was to broaden the grant of federal jurisdiction to cover all types of nuclear incidents, not just catastrophic accidents, those amendments did not supplant state substantive law. Instead, Congress's expressed intent was to authorize a single forum for such litigation and to avoid the inefficiencies that occurred in the wake of the Three Mile Island incident. *See* S. Rep. No. 218, *supra* at 13, *reprinted in* 1988 U.S.C.C.A.N. 1488. Thus, "[r]ather than designing a new body of substantive law to govern [public liability actions], ... the substantive rules for decision [were to] be derived from the law of the state in which

the nuclear incident involved occurs." H.R. Rep. No. 104, *supra*, pt. 1 at 18. There is much more similar legislative history, *see, e.g.*, S. Rep. No. 70, *supra* at 20, *reprinted in* 1988 U.S.C.C.A.N. at 1433; H.R. Rep. No. 104, *supra*, pt. 1 at 5, and, to our knowledge, none to the contrary.

In our judgment, given the PAA's text and legislative history, any argument for complete preemption of the field of nuclear radiation torts must fail. Moreover, in light of the broad role that Congress has mandated for state substantive law under the PAA, complete preemption cannot be justified on the ground that federal law "occupies the field" of nuclear safety.

To be sure, in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 205 (1983), this Court intimated that there was no room for state regulation of nuclear safety. However, the very next Term, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), held that the preemptive effect of the PAA should "*not* be judged on the basis that the Federal Government has so completely occupied the field of nuclear safety that state remedies are foreclosed." 464 U.S. at 256 (emphasis added). To the contrary, the Court said that

> it is clear that in enacting and amending the Price-Anderson Act, Congress assumed that state-law remedies, *in whatever form they might take*, were available to those injured by nuclear incidents. This was so even though it was well aware of the NRC's exclusive authority to regulate safety matters. No doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may

> nevertheless award damages *based on its own law of liability*. But as we understand what was done over the years in the legislation concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less. It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to accept.

Id. (emphasis added); *see also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 186 (1988) (characterizing *Silkwood*: "Congress was willing to accept regulatory consequences of application of state tort law to radiation hazards even though direct state regulation of safety aspects of nuclear energy was pre-empted").

The lack of conflict between a state-law damages action and federal regulatory objectives is underscored in the Robertses' case by the dual nature of the federal dose requirements. The regulations set maximum permissible dose limits, which form a ceiling for exposure levels permitted by the NRC. 10 C.F.R. 20.1201(a). The federal regulations also recognize that the federal maximum radiation levels may not provide adequate protection from radiation exposure and thus directs business to take additional precautions: "The licensee shall use, to the extent practicable, procedures and engineering controls based upon sound radiation protection principles to achieve occupational doses and doses to members of the public that are as low as is reasonably achievable (ALARA)." 10

C.F.R. 20.1101(b); *see also Silkwood*, 464 U.S. at 243 & n.6 (describing ALARA); 10 C.F.R. 20.1003 (defining ALARA). Thus, state standards of care provide another incentive for nuclear power plant operators to decrease the levels of radiation emitted at their plants, and as such, they further, rather than undermine, federal nuclear safety objectives.

3. *Tribal Courts Have Jurisdiction To Hear Public Liability Actions.*

Since the PAA is not a complete preemption statute, tribal courts are plainly competent, in the first instance, to determine the preemption question and, in effect, their own jurisdiction. The question whether tribal courts have jurisdiction over public liability actions is, of course, a separate question, and one which the Court may not reach here because of respondents' failure to cross-appeal from that portion of the lower court's injunctions that held that the tribal court could not entertain claims arising under the PAA. Although the answer is not free from doubt, we believe that public liability actions may be filed in tribal court, without a right of removal to federal court. In any event, the fact that it is a close question underscores the correctness of the decision below on the exhaustion issue.

As noted earlier, the PAA does not expressly address tribal jurisdiction. Ordinarily, when Congress creates a cause of action with original jurisdiction in the federal courts, without expressly negating jurisdiction in other courts, as it has done here with the public liability action, it is assumed that the jurisdiction of non-federal courts is concurrent. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981); *see generally* C. Wright, *The Law of Federal Courts* 268-69 (4th ed. 1983). And that presumption of concurrent jurisdiction

applies to tribal courts with equal, if not more, force as it does to state courts, because of the weight traditionally accorded tribal court sovereignty over matters involving Indians on reservation land. *See* S. Rep. No. 88, 103d Cong., 1st Sess. 8-9 (1993); H. R. Conf. Rep. No 383, 103d Cong., 1st Sess. 13 (1993); U.S. Br. 10 & n.6. The fact that the PAA permits removal of public liability actions from state to federal court, but makes no mention of tribal courts, might be taken as an indication that the Members of Congress who voted for the 1988 PAA amendments never gave any thought to the possibility that nuclear tort suits would be filed in tribal court. Although that may be true, Congress is presumed to speak through the text of enacted statutes, and absent strong evidence to the contrary, which does not exist here, tribal courts have jurisdiction over public liability actions given Congress's failure to bar such actions.

On the other hand, the 1988 PAA amendments express a preference for federal-court jurisdiction, by allowing all nuclear incident claims to be filed in the district where the incident occurred, and providing an absolute right of removal from state to federal court. 42 U.S.C. 2210(n)(2). Moreover, we acknowledge that the principal purpose of these provisions was to allow multiple cases involving one nuclear incident to be centralized in one court, H.R. Rep. No. 104, *supra*, pt. 1 at 18, and allowing public liability actions to go forward in tribal courts might undermine that objective to some degree. As the Solicitor General points out (U.S. Br. 23), however, many cases, such as the Robertses' and the cases presently before the Court, involve only one set of plaintiffs and therefore cannot possibly frustrate any interest in consolidation. On balance, we do not believe that the congressional goal of efficiency is enough to counter the PAA's failure explicitly to abrogate tribal

court jurisdiction.[2]

Two other factors weigh in favor of tribal court jurisdiction. First, although it is possible that Congress did not contemplate tribal jurisdiction over public liability actions, it is equally possible that Congress did consider the matter and simply chose not to alter the basic presumption in favor of tribal jurisdiction. As respondents point out in their brief, uranium mining activities on reservation land are not unusual, and

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[2] *Amicus* American Nuclear Insurers agrees that public liability actions may be filed in tribal court because the PAA provides no basis for abrogating tribal court jurisdiction, but argues that defendants in public liability actions should be permitted to remove a case from tribal court to federal court. ANI Br. 21-22. This "solution" must be rejected because it has no basis in the PAA, which allows removal only from state, not tribal, courts. 42 U.S.C. 2210(n)(2). Recognizing this fact, and because of "the rule favoring retained tribal sovereignty to the extent consistent with federal law," the Solicitor General would permit a public liability action to be filed in tribal court, but then allow a defendant, after providing notice in the tribal court, to obtain a federal court injunction against the exercise of tribal court jurisdiction. U.S. Br. 24, 25. The Solicitor General says that the tribal court plaintiffs would be "free to refile ... in federal court." *Id.* at 25. Like the American Nuclear Insurers' position, this "different approach" (*id.* at 24) has no basis in the PAA, and comes with the added burden that, upon re-filing their cases in federal court, the plaintiffs may find that the statute of limitations has run. Petitioners' *amici* fail to recognize that the question here is not whether an alternative scheme may be a good idea, but whether Congress authorized it.

Congress might reasonably have envisioned suits such as those at issue here, but chose not to force them all into federal court because of concerns about tribal sovereignty. Indeed, the very fact that the NRC has recently "recommend[ed] that Congress should determine whether a public liability action ... may be filed in a tribal court," NRC, *The Price Anderson Act—Crossing the Bridge to the Next Century* 131 (Aug. 1998), strongly suggests that, under the current scheme, the agency charged with implementing the PAA believes that, as the PAA is currently written, public liability actions may be tried in tribal courts.

Second, the PAA's jurisdictional provision, particularly its language concerning removal, was not written on a blank slate, but rather against the backdrop of other jurisdictional statutes that provide for removal of various categories of cases from state to federal court, and do not mention removal from tribal courts. *See, e.g.*, 28 U.S.C. 1441(a), 1443; *see also* 28 U.S.C. 1447(a). Since no one disputes that tribal courts are competent to hear those kinds of cases, *see* U.S. Br. 22 ("tribal courts are courts of general subject-matter jurisdiction, and ... they are presumed competent to adjudicate claims arising under any source of law, including federal law"), it follows that tribal courts have jurisdiction to hear public liability actions. Indeed, Congress has provided original federal jurisdiction in some cases involving Indian tribes, *see, e.g.*, 28 U.S.C. 1353, demonstrating that Congress knows how to create federal jurisdiction on matters affecting Indians when it wishes to do so, and that it did not do so in the PAA.

In sum, tribal courts have jurisdiction to hear public liability actions and there is no basis for removing those actions to federal court. Although that conclusion is not directly relevant to this case unless this Court takes up the validity of

the district court's injunctions favoring petitioners, it leaves no doubt that the Ninth Circuit did not err on the tribal exhaustion question.

CONCLUSION

The decision of the court of appeals should be affirmed.

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